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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTHUR MOORE, individually and as
successor in interest of XAVIER MOORE,

Plaintiffs,

v.

CITY OF BERKELEY, a municipal
corporation; GWENDOLWYN BROWN,
KENNETH TU, BRANDON SMITH,
BRIAN MATHIS, TIMOTHY GARDNER,
NIKOS KASTMILER, AMBER PHILIPS
and BENJAMIN CARDOZA, individually
and in their official capacities as Police
Officers for the CITY OF BERKELEY and
DOES 1-50, inclusive; individually and in
their official capacities as POLICE
OFFICERS for the CITY OF BERKELEY,

Defendants.

Case No.: 3:14-cv-00669-CRB

**SECOND AMENDED COMPLAINT
FOR DAMAGES**

JURY TRIAL DEMANDED

INTRODUCTION

1
2 1. This civil rights and wrongful death action seeks compensatory and
3 punitive damages from Defendants for violating various rights under the United
4 States Constitution and state law in connection with the wrongful death of
5 Decedent XAVIER 'KAYLA' MOORE, who died on February 13, 2013, after
6 being unlawfully seized, restrained, arrested and battered by multiple CITY OF
7 BERKELEY Police Officers. Decedent XAVIER 'KAYLA' MOORE was a
8 transgender man with an extensive history of documented paranoid schizophrenia
9 and numerous prior contacts with Berkeley Police Officers. Despite being aware
10 of Decedent MOORE'S disabling condition the Officers initiated an unlawful
11 arrest. The Defendant Officers threw Decedent MOORE onto a futon and
12 restrained him with the combined body weight of at least six officers, in a
13 fashion that interfered with his ability to breath, which predictably intensified
14 his psychological distress and initiated a physiological crisis. Tragically,
15 XAVIER 'KAYLA' MOORE lost consciousness and died as a result of the
16 Officers' unwarranted and excessive use of force.

JURISDICTION

17 2. This action arises under Title 42 of the United States Code, Section
18 1983. Title 28 of the United States Code, Section 1331 and 1343 confers
19 jurisdiction upon this Court. The unlawful acts and practices alleged herein
20 occurred in the City of Berkeley, County of Alameda, California, which is within
21 this judicial district.

PARTIES

22 3. Decedent, XAVIER 'KAYLA' MOORE, died as a result of being
23 unlawfully seized by multiple City of Berkeley Police Officers. Decedent was a
24 biologically male, transgendered person who identified himself as female and
25 went by the name of 'KAYLA.' Decedent was unmarried at the time of death and
26 died without leaving a will. Decedent did not have any children. This action
27 seeks to recover damages for the violation of rights personal to Decedent. This
28 action is maintained on behalf of Decedent, by his successor in interest, his

1 father ARTHUR MOORE. Said plaintiff is a person with standing to bring the
2 action pursuant to California Code of Civil Procedure Sections 377.30.and
3 377.60 and California Probate Code Section 6402.

4 4. Plaintiff, ARTHUR MOORE, is now and at all times mentioned herein
5 a United States Citizen. Plaintiff is the father of and successor-in-interest to
6 Decedent XAVIER 'KAYLA' MOORE. He brings this action on his own behalf
7 and as successor-in-interest to his son, Decedent XAVIER 'KAYLA' MOORE.

8
9 5. Defendant CITY OF BERKELEY (Hereinafter "CITY") is, and at all
10 times herein mentioned, a municipal entity duly organized and existing under the
11 laws of the State of California. Under its authority, the CITY OF BERKELEY
12 operates the Berkeley Police Department.

13 6. At all times mentioned herein, GWENDOLYN BROWN (badge #16)
14 (Hereinafter "BROWN"), is being sued in her individual and official capacity as
15 a Police Officer for the City of BERKELEY.

16 7. At all times mentioned herein, KENNETH TU (Hereinafter
17 "TU"), is being sued in his individual and official capacity as a Police Officer
18 for the City of BERKELEY.

19 8. At all times mentioned herein, BRANDON SMITH (badge #3)
20 (Hereinafter
21 "SMITH"), is being sued in his individual and official capacity as a Police
22 Officer for the City of BERKELEY.

23 9. At all times mentioned herein, BRIAN MATHIS (Hereinafter
24 "MATHIS"), is being sued in his individual and official capacity as a Police
25 Officer for the City of BERKELEY.

26
27 10. At all times mentioned herein, TIMOTHY GARDNER (Hereinafter
28

1 “GARDNER”), is being sued in his individual and official capacity as a Police
2 Officer for the City of BERKELEY.

3 11. At all times mentioned herein, NIKOS KASTMILER (Hereinafter
4 “KASTMILER”), is being sued in his individual and official capacity as a Police
5 Officer for the City of BERKELEY.

6 12. At all times mentioned herein, AMBER PHILIPS (Hereinafter
7 “PHILIPS”), is being sued in her individual and official capacity as a Police
8 Sergeant for the City of BERKELEY.

9 13. At all times mentioned herein, BENJAMIN CARDOZA (Hereinafter
10 “CARDOZA”), is being sued in his individual and official capacity as a Police
11 Sergeant for the City of BERKELEY.

12 14. Plaintiff is ignorant of the true names and/or capacities of
13 Defendants sued herein as DOES 1 through 50, inclusive, and therefore sue said
14 defendants by such fictitious names. Plaintiff will amend this complaint to
15 allege their true names and capacities when ascertained. Plaintiff believes and
16 alleges that each of the DOE defendants is legally responsible and liable for the
17 incident, injuries and damages hereinafter set forth. Each defendant proximately
18 caused injuries and damages because of their negligence, breach of duty,
19 negligent supervision, management or control, violation of public policy and
20 unlawful use of force. Each defendant is liable for his/her personal conduct,
21 vicarious or imputed negligence, fault, or breach of duty, whether severally or
22 jointly, or whether based upon agency, employment, ownership, entrustment,
23 custody, care or control or upon any other act or omission. Plaintiff will ask
leave to amend this complaint subject to further discovery.

24 15. In doing the acts alleged herein, Defendants, and each of them acted
25 within the course and scope of their employment.

26
27 16. In doing the acts and/or omissions alleged herein, Defendants, and
28

1 each of them, acted under color of authority and/or under color of law.

2
3 17. Due to the acts and/or omissions alleged herein, Defendants, and each
4 of them, acted as the agent, servant, and employee and/or in concert with each of
5 said other Defendants herein.

6 18. For State causes of action related to Federal claims, Plaintiff is
7 required to comply with an administrative claim requirement under California
8 law. Plaintiff has complied with all applicable requirements.

9
10 **FACTS**

11 19. On February 12, 2013, at approximately 11:40 p.m., Decedent
12 XAVIER 'KAYLA' MOORE and his caretaker, Edward Sterling, were at
13 MOORE's apartment, located at 2116 Allston Way, apartment 513, in Berkeley,
14 California. MOORE was a 41-year old, 347-pound, biologically male,
15 transgendered, African-American man with a well-documented history of
16 paranoid schizophrenia and numerous prior Berkeley Police Department
17 contacts related to his mental illness.

18 20. Defendant CITY OF BERKELEY Police Officers BRANDON SMITH
19 and GWENDOLYN BROWN went to Decedent MOORE's house after MOORE's
20 friend John Hayes called and requested mental health assistance for his friend.

21 21. When Berkeley Police Officers SMITH and BROWN arrived at the
22 apartment, Decedent MOORE was speaking irrationally and making overtly
23 paranoid comments about his belief that the uniformed officers were not really
24 police officers. MOORE was clearly in the midst of a paranoid schizophrenic
25 mental health crisis.

26 22. For unknown reasons, the officers ordered Decedent MOORE's
27 caregiver, Mr. Sterling, to leave the apartment. Despite knowing that they were
28 called to determine if Decedent MOORE needed mental health evaluation, the

1 officers did not question or evaluate Decedent MOORE to determine if was
2 presently at risk of harming himself or others, as is required to initiate a '5150'
3 hold. And despite knowing, that merely presenting signs and symptoms of a
4 well-documental mental illness falls short of the standard necessary to place a
5 citizen on an involuntary, seventy-two hour mental health evaluation hold. In
6 addition, Decedent MOORE's mental health caregiver was present and able to
7 provide care and support for MOORE.

8 23. Despite their prior knowledge and personal observations of Decedent
9 MOORE's mental condition, Officer SMITH ran Decedent MOORE and Mr.
10 Hayes' names for warrants in an attempt to justify using a standard arrest
11 procedure. Officer SMITH found an arrest warrant for Mr. Hayes and Officer
12 BROWN took Mr. Hayes into custody. Around this time, Defendant CITY OF
BERKELEY Police Officer KENNETH TU arrived at the apartment.

13 24. Officer SMITH found a warrant out of the City and County of San
14 Francisco for a person named 'Xavier Moore'; however, dispatch notified
15 Officer SMITH that the warrant was for a person approximately 60-years old,
16 20-years older than Decedent MOORE. Plaintiff is informed and believes that
17 CITY OF BERKELEY Police Department protocol requires its officers to
18 confirm a warrant prior to placing a citizen into custody. Due to the overt age
19 difference, Officer SMITH did not confirm the warrant and made this known to
20 Officer BROWN.

21 25. The Officers clearly knew that Decedent MOORE was not the person
22 named in the warrant, was not a suspect in any crime and had not been evaluated
23 to determine whether he was eligible for a 5150 hold. Nevertheless, Officer
24 BROWN inexplicably and arbitrarily decided that 'we might as well take him'
25 and told MOORE that they were going to arrest him. Decedent MOORE begged
26 the officers to '... confirm the warrant ...' prior to arresting him.

27 26. Officer BROWN signaled to Officer TU to initiate an arrest and
28

1 they both proceeded to grab Decedent MOORE's wrists and tried to place him
2 in handcuffs. Decedent MOORE, a paranoid schizophrenic, was understandably
3 frightened and confused when multiple Officers began to physically accost him.
4 He screamed out 'no, no.' Understandably, Decedent MOORE struggled with
5 the Officers and they threw him face down onto a futon on the floor. Officer
6 BROWN called for additional backup and Defendant CITY OF BERKELEY
7 Police Officers BRIAN MATHIS, TIMOTHY GARDNER and NIKOS
8 KASTMILER arrived.

9 27. Officer BROWN held Decedent MOORE face down on the futon by
10 pressing her body weight into Decedent MOORE's shoulder blades. Officer TU
11 lay on top of Decedent MOORE's lower body to prevent him from moving his
12 legs. Officer SMITH also used his body weight to hold MOORE face down on
13 the futon. Officer KASTMILER held down Decedent MOORE's arm to prevent
14 him from getting up and used his shins and knees to hold down Decedent
15 MOORE's legs. Decedent MOORE was screaming, 'Get off of me,' as he
16 desperately struggled to breathe under the combined body weight of the
17 Officers pushing him against the mattress. Decedent MOORE experienced
18 severe psychological and physiological trauma as he helplessly lay face down
19 with his airway restricted, for no legally justifiable reason.

20 28. Officer MATHIS grabbed Decedent MOORE's legs and crossed his
21 ankles so he could not move his legs. Officer GARDNER was also holding
22 Decedent MOORE's legs. The Decedent continued to beg and plead with the
23 Officers to 'get off of' him as he struggled to breathe under the weight and
24 force of six officers. The Officers then placed Decedent MOORE in handcuffs.

25 29. Defendant CITY OF BERKELEY Police Department Sergeant
26 BENJAMIN CARDOZA was present to witness some portion of the incident.
27 Defendant CITY OF BERKELEY Police Department Sergeant AMBER
28 PHILIPS brought a 'WRAP' device and the Officers tried to use the 'WRAP'

1 restraint to immobilize Decedent MOORE's legs. The 'WRAP' device did not
2 fit Decedent MOORE, so they decided to use the lower portion of the device to
3 restrain his ankles.

4 30. Finally, Decedent MOORE was unable to continue his terrifying
5 struggle to breathe and he lost consciousness, while the Officers stood by.
6 Decedent MOORE was face down, immobile, lifeless and completely still for
7 an indeterminate period of time. Plaintiff is informed and believes that there is
8 a City of Berkeley Police Department policy regarding the use of 'WRAP'
9 devices that informs officers that if a person suddenly becomes quiet and still
10 that the officers should summon immediate medical attention.

11 31. Eventually, the Officers decided to turn Decedent MOORE onto his
12 side and they realized that he was not breathing. The Officers removed the
13 handcuffs and Officer BROWN tilted Decedent MOORE's head back and
14 opened up his airway to initiate CPR. Officer TU began CPR chest
15 compressions on Decedent MOORE.

16 32. Plaintiffs are informed and believe that all CITY OF BERKELY
17 Police Officers are trained first responders and are required to stay currently
18 certified in CPR. Despite the presence of at least seven individuals qualified to
19 begin airway breathing, none of the officers initiated the necessary lifesaving
20 breathing which may have saved Decedent MOORE's life. By starting chest
21 compressions without airway breathing Officer TU added insult to injury by
22 exacerbating Decedent MOORE's trauma by violently pushing on his chest.

23 33. During the incident, Sergeant Philips and other Officers made
24 discriminatory comments when they pejoratively referred to Decedent MOORE
25 as 'it' and made irrelevant inquiries into Decedent MOORE's gender
26 identification. Plaintiff is informed and believes that Decedent MOORE's
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1 status, as a transgender man, was a factor in the Officers' decision to refuse to
2 perform CPR properly.

3
4 34. In addition, after Decedent MOORE had died, Officers unlawfully
5 seized numerous articles of Decedent MOORE's personal property without any
6 legitimate reason and without a search warrant. Plaintiff is informed and
7 believes that seizing personal property from the home of a mentally ill person
8 beyond that which is within their immediate control is prohibited by Berkeley
9 Police Department general orders as well as clearly violating the Fourth
10 Amendment prohibition against unlawful search and seizure.

11 35. These Officers blatantly ignored Decedent MOORE's well
12 documental medical needs and maliciously initiated an unwarranted and
13 unlawful arrest in violation of Decedent MOORE's Fourth Amendment right
14 against unreasonable seizure and excessive force. Decedent MOORE died as a
15 result of the unconstitutional actions initiated by Officer BROWN.

16 36. Plaintiff is informed and believes and thereon alleges that CITY OF
17 BERKELEY and DOES 26-50, inclusive, breached their duty of care to the
18 public in that they have failed to discipline the named defendants for their
19 respective misconduct and involvement in the incident described herein. Their
20 failure to discipline defendants: SMITH, BROWN, TU, MATHIS, GARDNER,
21 KASTMILER and DOES 1-25 inclusive, demonstrates the existence of an
22 entrenched culture, policy or practice of promoting, tolerating and/or ratifying
23 with deliberate indifference, the use of excessive and/or deadly force and the
24 fabrication of official reports to cover up defendants' BERKELEY Police
25 Officers SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER,
26 PHILIPS, CARDOZA and DOES 1-25's inclusive, misconduct.

27 37. Plaintiffs are informed and believe and thereon allege that members
28 of the BERKELEY Police Department, including, but not limited to,

1 defendants, BERKELEY Police Officers SMITH, BROWN, TU, MATHIS,
2 GARDNER, KASTMILER, PHILIPS, CARDOZA and/or DOES 1-25 and/or
3 each of them, have individually and/or while acting in concert with one
4 another, engaged in a repeated pattern and practice of using excessive, arbitrary
5 and/or unreasonable force against individuals, including, but not limited to
6 decedent, XAVIER 'KAYLA' MOORE.

7 38. Plaintiff is informed and believes and thereon alleges that CITY OF
8 BERKELEY and DOES 26-50, inclusive, breached their duty of care to the
9 public in that they have failed to retrain the named defendants in the proper
10 making of 5150 evaluations, making arrests based on out of county warrants,
11 how to properly restrain an individual and/or provide CPR to persons after their
12 involvement in the incident described herein. Their failure to retrain
13 defendants: SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER and
14 DOES 1-25 inclusive, demonstrates the existence of an entrenched culture,
15 policy or practice of promoting, tolerating and/or ratifying with deliberate
16 indifference, the use of improper techniques and procedures to make 5150
17 detentions, arrests, restraints and/or emergency medical aid.

18 39. Plaintiff is further informed, believes and therein alleges that as a matter of
19 official policy -- rooted in an entrenched posture of deliberate indifference to the
20 constitutional rights of citizens who live in the City of BERKELEY-- defendant CITY OF
21 BERKELEY has long allowed its citizens, such as the decedent to be abused by its police
22 officers, including BERKELEY Police Officers SMITH, BROWN, TU, MATHIS,
23 GARDNER, KASTMILER, PHILIPS, CARDOZA and/or DOES 1-25 and/or each of
24 them, individually and/or while acting in concert with one another.

25 40. Plaintiffs' are informed, believe and therein allege that CITY OF BERKELEY
26 knew, had reason to know by way of actual or constructive notice of the aforementioned
27 policy, culture, pattern and/or practice and the complained of conduct and resultant
28 injuries/violations.

DAMAGES

41. As a consequence of Defendants' violation of Plaintiff's federal civil rights under 42 U.S.C. §1983, the Fourth and Fourteenth Amendment, Plaintiff ARTHUR MOORE was mentally, and emotionally injured and damaged as a proximate result of decedent's wrongful death, including but not limited to Plaintiffs' loss of: familial relations, decedent's society, comfort, protection, companionship, love, affection, solace, and moral support.

42. ARTHUR MOORE is entitled to recover wrongful death damages pursuant To C.C.P. Sections 377.60 and 377.61 and Probate Code Section 6402(b). Additionally, plaintiff is entitled to the reasonable value of funeral and burial expenses pursuant to C.C.P. §§ 377.60 and 377.61.

43. Decedent, XAVIER 'KAYLA' MOORE, by and through his successor in interest ARTHUR MOORE, is entitled to recover damages pursuant to Decedent's right of survivorship for the pain and suffering he endured as a result of the violation of his civil rights.

44. Plaintiff found it necessary to engage the services of private counsel to vindicate the rights of decedent and plaintiff's rights under the law. Plaintiff is therefore entitled to an award of attorneys' fees and/or costs pursuant to statute(s) in the event that he is the prevailing parties in this action under 42 U.S.C. §§§§ 1983, 1985-86 and 1988.

FIRST CAUSE OF ACTION

Fourth Amendment—Detention and Arrest (42 U.S.C. §1983)

(Against Defendants SMITH, BROWN, TU, and DOES 1-25)

45. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 44 of this complaint.

1 46. When the Defendant Officers determined to arrest Decedent MOORE pursuant
 2 to a warrant they knew that Decedent was not the subject of and then grabbed Decedent
 3 and forced him to the ground in an attempt to place him in handcuffs, they violated
 4 Decedent's right to be secure in his person against unreasonable searches and seizures as
 5 guaranteed to Decedent under the Fourth Amendment to the United States Constitution.
 6

7 47. The Defendant Officers detained Decedent without reasonable suspicion and
 8 arrested him without probable cause, in violation of their training. As a result of their
 9 misconduct, all these Defendant Officers are liable for Decedent's and Plaintiff's injuries,
 10 either because they were integral participants in the wrongful detention and arrest, or
 11 because they failed to intervene to prevent these violations.
 12

13 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.
 14

15 **SECOND CAUSE OF ACTION**

16 **Fourth Amendment—Excessive Force (42 U.S.C. §1983)**

17 (Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER,
 18 CARDOZA and DOES 1 – 25)

19 48. Plaintiffs hereby re-allege and incorporate by reference paragraphs 1 through 47
 20 of this Complaint.

21 49. When the Defendant Officers beat and used improper restraint procedures on
 22 Decedent until he lost consciousness and died, they deprived Decedent of his right to be
 23 secure in his person against unreasonable searches and seizures as guaranteed to Decedent
 24 under the Fourth Amendment to the United States Constitution. The Defendant Officers'
 25 actions were excessive and unreasonable, especially because Decedent was unarmed and
 26 outnumbered by approximately 8 to 1 by the Defendant Officers, and Decedent was in the
 27 midst of a mental health crisis. The Defendant Officers' beating of Decedent, together with
 28

1 the improper restraint procedures they used, violated their training.

2 50. As a result of their misconduct, each of the Defendant Officers is liable for
3 Decedent's and Plaintiff's injuries, either because they integral participated in, or failed to
4 intervene in, the conduct described above;

5 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.
6

7
8 **THIRD CAUSE OF ACTION**

9 **(Violations of Plaintiffs' 14th Amendment Rights/Right to Familial
10 Relationship--42 U.S.C. § 1983)**

11 (Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER,
12 PHILIPS, CARDOZA, and DOES 1 – 25)

13 51. Plaintiffs hereby re-allege and incorporate by reference herein paragraphs 1
14 through 50 of this Complaint as though fully set forth;

15 52. Plaintiff had a cognizable interest under the Due Process Clause of the
16 Fourteenth Amendment of the United States Constitution to be free from state actions that
17 deprive him of life, liberty, or property in such a manner as to shock the conscience,
18 including but not limited to the unwarranted state interference in his familial relationship
19 with his son, Decedent MOORE.

20 53. Decedent had a cognizable interest under the Due Process Clause of the
21 Fourteenth Amendment of the United States Constitution to be free from state actions that
22 deprive him of his right to life, liberty, or property in such a manner as to shock the
23 conscience.

24 54. The following, but not limited to, conduct of the Defendant Officers shocks the
25 conscience:
26

27 a. knowingly arresting Decedent pursuant to an unverified warrant that Decedent
28

1 was not the subject of;

2 b. improperly restraining Decedent as he screamed and begged for mercy;

3 c. beating Decedent while he was outnumbered 8 to 1;

4 d. ignoring Decedent's mental health needs and departmental directives on how
5 to interact with Decedent;

6 e. refusing to use proper rescue techniques on Decedent because of his
7 transgender status;

8 f. pejoratively referring to Decedent as "it" due to his transgender status;

9 g. attempting to conceal their excessive use of force and hide the true cause of
10 decedent's demise to deprive Plaintiff of his right to seek redress
11

12 n. integrally participating in or failing to intervene in the above misconduct.
13

14 55. The aforementioned actions of the Defendant Officers, while acting under color
15 of state law, and without due process of law, violated the substantive due process rights of
16 Plaintiff to be free from unwarranted interference with his familial relationship with
17 Decedent.

18 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.
19

20 **FOURTH CAUSE OF ACTION**

21 **(Municipal Liability for Unconstitutional Custom or Policy (*Monell*)—42 U.S.C.**
22 **section 1983)**

23 (Against Defendant CITY and DOES 26-50)

24 56. Plaintiff hereby re-alleges and incorporates by reference herein paragraphs 1
25 through 55 of this Complaint.

26 57. Plaintiff is informed and believes and thereon alleges that high-ranking CITY
27
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1 OF BERKELEY officials, including high-ranking police supervisors and DOES 26
2 through 50, and/or each of them, knew and/or reasonably should have known about
3 repeated acts of misconduct by Defendant Officers and DOES 1-25, and/or each of them.

4 58. Despite having such notice, Plaintiff is informed and believes and
5 thereon alleges that Defendant DOES 26-50, and/or each of them, approved, ratified,
6 condoned, encouraged, sought to cover up, and/or tacitly authorized the continuing pattern
7 and practice of misconduct and/or civil rights violations by said police officers.

9 59. Plaintiff is further informed and believes and thereon alleges that as
10 a result of the deliberate indifference, reckless and/or conscious disregard of the
11 misconduct by Defendants DOES 1-25 and/or each of them, encouraged these officers to
12 continue their course of misconduct and caused these officers' lack of training, resulting in
13 the violation of the Plaintiff's rights as alleged herein.

14 60. Plaintiff further alleges that Defendant DOES 26-50, and/or each of
15 them, were on notice of the Constitutional defects in their training of CITY OF
16 BERKELEY police officers, including, but not limited to making unlawful detentions
17 and/or arrests, improper restraint tactics and/or procedures and improper and/or
18 inadequate emergency medical aid along with using excessive force.

19 61. The aforementioned acts and/or omissions and/or deliberate indifference by
20 high ranking CITY OF BERKELEY officials, including high ranking CITY OF
21 BERKELEY Police Department supervisors and Defendant DOES 26-50, and each of
22 them resulted in the deprivation of Plaintiff's constitutional rights including, but not
23 limited to the right to not be deprived of life, liberty or property without due process of the
24 law, as guaranteed by the Fourteenth Amendment to the United States Constitution and the
25
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1 right to be free from excessive force and unlawful seizure by police officers, as guaranteed
2 by the Fourth Amendment to the United States Constitution.

3 WHEREFORE, plaintiff prays for relief as hereinafter set forth.
4

5 **SIXTH CAUSE OF ACTION**

6 **(Wrongful Death - Negligence)**

7 **(C.C.P. §377.60 and 377.61)**

8 (Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER,
9 KASTMILER, PHILIPS, CARDOZA and DOES 1-25)

10 62. Plaintiff re-alleges and incorporates by reference herein paragraphs 1 through
11 61 of this Complaint, except for any and all allegations of intentional, malicious, extreme,
12 outrageous, wanton, and oppressive conduct by defendants, and any and all allegations
13 requesting punitive damages.

14 63. Defendants and DOES 1 – 25 inclusive, by and through their respective agents
15 and employees, proximately caused the death of Decedent XAVIER ‘KAYLA’ MOORE
16 on February 13, 2013 as a result of their negligent conduct and/or negligent failure to act as
17 set-forth herein.
18

19 64. As an actual and proximate result of said defendants’ negligence, and the death
20 of decedent, plaintiff ARTHUR MOORE has sustained pecuniary loss resulting from the
21 loss of comfort, society, attention, services, and support of his son, Decedent, in an amount
22 according to proof at trial.

23 65. As a further actual and proximate result of said defendants’ negligence,
24 plaintiff incurred funeral and burial expenses, in an amount according to proof at trial.
25

26 66. Pursuant to California C.C.P. Sections 377.60 and 377.61, plaintiff has
27 brought this action, and claim damages from said defendants for the wrongful death of
28

1 Decedent, and the resulting injuries.

2
3 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

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5 **SEVENTH CAUSE OF ACTION**

6 **(Violation of CALIFORNIA CIVIL CODE § 51.7)**

7 (Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER,
8 KASTMILER, PHILIPS and DOES 1 – 25)

9 67. Plaintiff re-alleges and incorporates by reference herein paragraphs 1 through
10 66 of this complaint.

11 68. Plaintiffs are informed and believe and thereon allege that the conduct of
12 Defendants SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER and DOES 1-
13 25, inclusive, as described herein, was motivated by prejudice against XAVIER 'KAYLA'
14 MOORE. Plaintiff is and was readily recognizable as a transgendered, male-to-female,
15 African-American. In addition, one or more of the Defendants used a derogatory term by
16 calling the Decedent 'it' while in the process of using force and/or detaining Decedent. In
17 engaging in such conduct, Defendants violated Plaintiff's rights under California Civil
18 Code §51.7 to be free from violence, or intimidation by threat of violence committed
19 against him because of his gender and/or sexual orientation.
20

21 69. Under the provisions of California Civil Code §52(b), Defendants are liable for
22 punitive damages for each violation of Civil Code §51.7, reasonable attorney's fees and an
23 additional \$25,000.00.

24 70. As a proximate result of Defendants' wrongful conduct, Plaintiff suffered
25 damages as hereinafter set forth.

26 WHEREFORE, plaintiff prays for relief as hereinafter set forth.
27
28

EIGHTH CAUSE OF ACTION

(Violation of CALIFORNIA CIVIL CODE §52.1)

(Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER,
KASTMILER, PHILIPS and DOES 1 – 25)

71. Plaintiffs re-allege and incorporate by reference paragraphs 1 through 70 of this complaint.

72. Defendants' above-described conduct constituted interference, and attempted interference, by threats, intimidation and coercion, with the decedent's peaceable exercise and enjoyment of rights, including but not limited to his right to be free from unreasonable search and seizure, to due process, to equal protection of the laws, to be free from state actions that shocks the conscience, and to life, liberty, and property, secured by the Constitution and laws of the United States and the State of California, in violation of California Civil Code §52.1.

WHEREFORE, Plaintiff prays for relief as hereinafter set forth.

TENTH CAUSE OF ACTION

(Battery)

(Against Defendants SMITH, BROWN, TU, MATHIS, GARDNER,
KASTMILER, PHILIPS, CARDOZA and DOES 1-25)

73. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 72 of this complaint.

74. Defendants' while working as police officers for the CITY OF BERKELEY, and acting within the course an scope of their duties, intentionally struck, grabbed, placed

1 their weight upon Decedent as well as forced him into a restraining device.

2 75. As a result of the actions of these Defendants, Decedent ultimately died from
3 his injuries. The Defendant Officers did not have legal justification for using the force
4 against Decedent, and these Defendants' use of force while carrying out their police officer
5 duties was an unreasonable use of force.
6

7
8 WHEREFORE, Plaintiff prays for relief as hereinafter set forth
9

10 **ELEVENTH CAUSE OF ACTION**

11 **(Violation of 42 U.S.C. section 12132)**

12 **(Against Defendant CITY OF BERKELEY)**

13 76. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 75 of
14 this complaint.

15 77. As against Defendant CITY, and/or DOES 26-50 in their capacity as official
16 policy-maker(s) for the CITY OF BERKELEY, Plaintiff further alleges that said
17 defendants failed to train, supervise, and or discipline Defendants SMITH, BROWN, TU,
18 MATHIS, GARDNER, KASTMILER and DOES 1-25: in recognizing symptoms of
19 disability under Title II of the Americans With Disabilities Act and from excluding
20 qualified individuals, such as Plaintiff XAVIER MOORE, from participating in or denying
21 benefits and services provided by Defendant CITY; or from otherwise discriminating
22 against such qualified individuals with symptoms of disability recognized under Title II of
23 the Americans with Disabilities act, resulting in the false arrest of Decedent MOORE
24 during the course of the subject-incident and which ultimately resulted in his death.
25

26 78. At the time Defendant Officers SMITH, BROWN, TU, MATHIS,
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1 GARDNER, KASTMILER and DOES 1-25 made contact with Decedent MOORE they
2 knew and/or had reason to know he was experiencing a mental crisis and were aware of
3 Decedent MOORE'S disability and the symptoms and manifestations of Decedent
4 MOORE'S recognized disability, and yet these Defendant Officers decided to unlawfully
5 arrest Decedent MOORE on an outstanding warrant that he was not the subject of, further
6 exacerbating his mental health crisis. In addition, these Defendant Officers failed to
7 provide reasonable accommodations during their encounter and arrest of Decedent Moore
8 by failing: to utilize inter-departmental protocols when evaluating whether he, as a mental
9 health suspect, was a danger to himself or others; to follow inter-departmental and
10 industry-wide accepted protocols when encountering mentally unstable suspects; and to
11 utilize inter-departmental protocols that were specifically created to inform CITY OF
12 BERKELEY police officers how to handle encounters with Decedent MOORE
13 specifically.
14

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16 79. The aforementioned conduct of Defendant Officers SMITH, BROWN, TU,
17 MATHIS, GARDNER, KASTMILER and DOES 1-25, in failing to make reasonable
18 accommodations for Decedent MOORE denied him the benefits of Defendant CITY OF
19 BERKELEY'S programs and activities, and/or discriminated against Decedent MOORE
20 by reason of his recognized disability
21

22 WHEREFORE, Plaintiff prays for relief as hereinafter set forth.
23

24 **JURY DEMAND**

25 78. Plaintiff hereby demands a jury trial in this action.
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PRAYER

WHEREFORE, plaintiff prays for relief, as follows:

1. For general damages in a sum to be determined according to proof;
2. For special damages, including but not limited to, past, present and/or future wage loss, income and support, medical expenses and other special damages in a sum to be determined according to proof;
3. For funeral and burial expenses according to proof;
4. For punitive damages and exemplary damages in amounts to be determined according to proof as to defendants SMITH, BROWN, TU, MATHIS, GARDNER, KASTMILER and/or DOES 1 through 25 and/or each of them;
5. For reasonable attorney's fees pursuant to 42 U.S.C. §1988 and U.S.C. Section 794a;
7. For violation of California Civil Code Sections 51.7 and 52.1, statutory damages, and reasonable attorney's fees;
8. For cost of suit herein incurred.

LAW OFFICES OF JOHN L. BURRIS

Dated: October 10, 2014

/s/ Adante D. Pointer

Adante D. Pointer

ATTORNEY FOR PLAINTIFF